



NATIONAL ASSOCIATION OF STATE FORESTERS

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August 17, 2023

Public Comments Processing
US Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

ATTN: FWS-HQ-ES-2023-0018
MS: PRB/3W

ATTN: FWS-HQ-ES-2021-0104
MS: JAO/3W

ATTN: FWS-HQ-ES-2021-0107
MS: PRB/3W

Dear Sir/Madam:

This comment letter addresses three separate proposed Endangered Species Act (ESA) rule changes, as referenced above, published in the Federal Register on June 22, 2023.

The National Association of State Foresters (NASF) represents the directors of forestry agencies in all 50 states, five U.S. territories, three nations in compact of free association with the U.S., and the District of Columbia. These agencies protect and help manage over 500 million acres of forest across the U.S., hand-in-hand with local governments, individuals, and families. They also regularly contribute to the management and protection of federal forest lands.

Forests provide a habitat for a host of rare, threatened, or endangered species of plants and animals. They also ensure important water quality and quantity requirements for aquatic species. That being the case, NASF has a significant interest in seeing that ESA is implemented in a way that efficiently and effectively protects species of concern. Attached is an NASF position statement entitled *Improving the Effectiveness of the Endangered Species Act* that was adopted by the membership in 2020.

In 2018, we commented on proposed rule changes that we felt were positive steps toward improving ESA implementation (see attached). We are disappointed to see that these new proposals essentially reverse the changes that were ultimately adopted in 2019. Specific concerns follow.

Executive Director
Jay Farrell

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Reinstatement of the “blanket rules” policy implies that there is no difference in the status of endangered species versus threatened species. Yet Congress clearly distinguished between the two in the original act. The 2019 rule required that threatened species must have species-specific rules, typically referred to as 4(d) rules. We agree with the US Fish and Wildlife Service’s (USFWS) 2019 conclusion that “finalizing a species-specific 4(d) rule concurrent with a listing or reclassification determination adds efficiency, predictability, and transparency to the rulemaking process for the public and to the regulated community because it connects the Service’s analysis of threats that have a negative impact on the species to measures designed to provide for the conservation of the species.”

One example of how a 4(d) rule functions effectively can be found in the case of the Northern Long-eared bat (NLEB), which allowed for continued management of forest habitat, ensuring that forest landowners could continue to enhance and maintain forest health while creating forest conditions beneficial to bats. The 4(d) rule gave transparency and predictability to natural resource management between the original listing as threatened, and the 2023 up-listing to endangered as white-nose syndrome caused the continued decline of bat populations. As it stands, habitat loss is not a primary factor in bat population decline, nor is there a concern that it may be an emerging factor, given that active management of forested lands represents a vital tool to promote the permanence of bat habitat on the landscape. We hope the success of the 4(d) species-specific rule for NLEB provides a compelling argument for why species newly listed as threatened benefit from 4(d) rules and likewise can be harmed by unspecific blanket rules and the so-called “protections” they provide. In March of 2023, USFWS issued *Interim Voluntary Guidance for the Northern Long-Eared Bat: Forest Habitat Modification*, in which USFWS stated that “sustainable forestry results in healthy forests that are essential for the long-term conservation of the Northern Long-eared bat.” There is a demonstrated benefit to the option to use a species-specific 4(d) rule to invite the conservation and management community to participate in governance that will impact their work.

Further, we believe that addressing global climate change more broadly (Executive Order 13990) is sufficiently more urgent today than when the ESA was first enacted in 1973. As such, we anticipate that 4(d) allowances will offer a wider range of tools for natural resource agencies in partnership with landowners to reduce the negative consequences of global change on threatened species populations. For instance, unprecedented wildfire seasons across North America have directly impacted plant and wildlife populations – as an example, the Hermes copper butterfly was recently listed as threatened due in part to the impact of devastating wildfires in 2003 and 2020¹.

Combined with the impact of land use change, habitat loss and fragmentation due to development, and accelerating climate change among others, we believe USFWS should prioritize proactively

¹ US Fish and Wildlife Service Final Rule Determining Threatened Species Status for the Hermes copper butterfly published December 21, 2021. Federal Register Docket Number FWS-R8-ES-2017-0053. Document Number 2021-27157.

addressing the cumulative effects of global climate change on species populations. It should be a priority to allow for land management activities that holistically consider disturbance regimes and restoration efforts (i.e., using active management to realign fire intensity, severity, and return intervals with historical patterns, actively managing the impacts caused by invasive species or managing to increase resilience in the face of altered precipitation and storm regimes, etc.), investing in and maintaining green natural resource economies which sequester and store carbon, and incentivizing landowners to continue actively managing landscapes for habitat and multiple uses rather than creating perverse incentives that may result in landscape fragmentation and land use-conversion.

Applying blanket rules rather than requiring species-specific 4(d) rules, creates the risk of the ESA becoming further outdated to the current and emerging threats of global climate change and further reduces the options for land managers to proactively participate in the long-term conservation of endangered and threatened species. While we do not doubt that all the Section 9 protections may be applicable for the conservation of some threatened species, we encourage USFWS to view the issue with respect to both short- and long-term risks and opportunities that may disappear should a blanket ruling be reinstated. NASF believes species-specific 4(d) rules should still be required as the first option if USFWS and National Marine Fisheries Service (NMFS) retain the authority to apply blanket rules.

Regarding proposed changes to Inter-agency Consultations (typically called Section 7 Consultations), we have concerns with giving the USFWS and NMFS the authority to require “off-setting measures outside the action area.” It is clearly stated that recommendations in the consultation process “may only involve minor changes.” Yet some of the examples cited, such as conservation easements and habitat banking, are far from minor and appear to be an attempt to extend the agency’s regulatory involvement beyond federal actions.

Redefining the “Effects of the Action” to say that they “may include consequences occurring outside the immediate area involved in the action” is a broad and overly vague statement. There are practical limits to analyses of effects on listed species. Without reasonable sideboards on the extent of any analysis, consultations could take years and substantial dollars to complete. A requirement this broad will ultimately end up in court as “outside the immediate area” could include virtually anything. Additionally, given USFWS’s recognition of the conservation benefits sustainable forest management provides for threatened and endangered species that use forest areas as habitat, USFWS should consider the consequences of no action in Section 7 Consultations.

More clarity is needed regarding the criteria for designating critical unoccupied habitats. NASF believes it is inappropriate for federal agencies to designate “habitat” or “critical habitat” in areas that, at the time of listing, do not “contain the physical or biological features essential to the

conservation of the species” or would have to be substantially altered from their current condition to meet the habitat needs of a species. It would be prudent to recommend that unoccupied areas designated as critical habitats are held to the same standards as occupied habitats. NASF believes the final sentence of § 424.12(b)(2) is appropriate and should not be removed in this revision. This may help assure that areas deemed “essential for the conservation of the species” will benefit the species in question.

In terms of decisions to list a species, we understand that the plain language of the ESA precludes consideration of economic impacts. Yet there are provisions in the law that address economics, such as the Endangered Species Committee’s (the God Squad) basis for providing exceptions. Additionally, the designation of critical habitat includes economic considerations. We feel all stakeholders would benefit from the two agencies clearly stating the economic consequences of any listing decision.

The proposal also needs clarity regarding the criteria for delisting. The word “recovered” and the phrase “otherwise does not meet the definition of an endangered or threatened species” are, in essence, the same thing, obviating the need for adding the word “recovered” back into that portion of the rule. We also strongly believe that the criteria for listing and delisting should be the same and hope the final rule states this very clearly.

We appreciate this opportunity to comment and would be happy to further clarify our concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Kacey KC', with a long horizontal flourish extending to the right.

Kacey KC
NASF President
Nevada State Forester